United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

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75-7038

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To be argued by
HERBERT M. WACHTELL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 75—7038, 75—7055, 75—7057

HOWARD BERSCH,
Plaintiff-Appellee,

against

ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,
Defendants-Appellants,

and

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL & CO., LIMITED, GUINESS MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO., INCORPORATED, J. H. CRANG & CO., INVESTORS OVERSEAS BANK LIMITED,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT I.O.S., LTD. (Now in Liquidation)

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Preliminary Statement

This is an appeal by permission of this Court, pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, from that portion of an Opinion and Order of the Honorable Robert L. Carter of the United States District Court, Southern District of New York, filed November 27, 1974, which denied the motions of defendant-appellant

I.O.S., Ltd. ("IOS") and several other defendants, seeking to dismiss the complaint herein on the grounds, inter alia, that:

(a) the subject matter of this action is not within the jurisdiction of the federal courts under the securities laws of the United States; and

(b) alternatively, the federal courts lack subject matter jurisdiction under the ecurities laws over the claims asserted herein on behalf of all members of plaintiff's alleged class who were non-citizens or non-residents of the United States and who purchased, solely in foreign countries, the foreign securities involved herein.

Judge Carter's Opinion and Order are set forth in full at pages A. 2A-282A of the Appellants' Appendix.*

IOS' Liquidation and Certain Pending Motions Below

At the outset it must be noted and emphasized that appellant IOS, a Canadian corporation, is now in liquidation in New Brunswick, Canada, pursuant to the Winding-Up Act of Canada, Revised Statutes of Canada, 1970, ch. W-10, as amended, and has made only a limited and special appearance herein

* References herein bearing the prefix letter "A" are to the Appellants' Appendix.

through its official Co-Liquidators, who were permanently appointed by the Supreme Court of New Brunswick, Canada on November 5, 1973 (A302A-305A; 378A-379A). Said appearance was made solely in an effort to protect the estate of IOS for the benefit of all its worldwide creditors and stockholders, by preventing the decentralized determination of claims against it in forums other than the Canadian liquidation court (308A-310A).

Both IOS Liquidators are Canadian chartered accountants and licensed Trustees in Bankruptcy; one is an employee and designee of the federal Government of Canada (A305A-306A). The foregoing is emphasized so that it is clear that IOS as presently constituted is subject to independent responsible and court approved control.*

It must also be noted that IOS' liquidation proceedings in Canada were the direct result of understandings reached

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* It is also noteworthy that the transactions involved in this action -- namely three foreign offerings of IOS common stock which were consummated in September 1969 -- occurred long prior, and are unrelated, to the well-publicized "Vesco era" in IOS' history, which commenced several years later and led to IOS' ultimate downfall. It appears that this important distinction may have escaped Judge Carter's notice since he begins his Opinion with the almost prejudicial statement that: "The instant action involve yet <u>another</u> chapter in the fitful <u>recent</u> history of IOS, Ltd" (A-252A) (emphasis added). Yet this action does <u>not</u> arise out of IOS' "recent" history and appellant is <u>not</u> aware of any "other" litigation concerning the 1969 offerings in the United States courts.

by an international governmental committee which consisted of representatives of the United States Securities and Exchange Commission ("S.E.C."), the securities commissions of the provinces of Ontario and Quebec, Canada, the federal government of Canada, and the Luxembourg Banking Commission (A304A-305A). That committee, in the interests of accomplishing the most orderly and expeditious disposition of the now notorious problems which afflicted the IOS complex after it fell into the hands of Robert L. Vesco and his associates, agreed that liquidations would be commenced and pursued with respect to various entities in the IOS complex, including I.O.S., Ltd. itself, in the respective corporate domiciles of each of said entities (A304A-305A). As a result of the agreement of the international committee, the liquidation of IOS was in fact commenced in New Brunswick, Canada, and the Supreme Court of New Brunswick thereafter appointed the present independent permanent Co-Liquidators of IOS.

Based on these circumstances, IOS' Co-Liquidators, in addition to challenging the subject matter jurisdiction of the District Court, also moved below for a stay of proceedings herein as against IOS, seeking, in the interests of international comity and principles favoring centralized administration of insolvents' estates, to require that the claims sought to be asserted against IOS in this action be raised instead in the Canadian liquidation court (A300A). IOS' stay motion was denied by Judge Carter, in his Opinion filed on November 27,

1974, with only the conclusory comment that it was not "well-taken" (A279A). Because of the substantial international issues involved, IOS' Co-Liquidators moved for reargument of the stay motion on December 13, 1974, and alternatively requested certification for appeal of the legal questions raised thereby pursuant to § 1292(b) (A381A-382A).

IOS additionally moved for reargument or alternatively for certification for appeal with respect to Judge Carter's denial of IOS' further motions to dismiss the complaint for plaintiff's failure to diligently prosecute this action as against IOS and for improper service on IOS (A381A-382A).*

None of IOS' motions for reargument and certification had been decided as of the time this brief was printed.

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* In connection with IOS' motion respecting plaintiff's failure to diligently prosecute this action against IOS, Judge Carter expressly found in his opinion that there was no excuse for defendant's failure to have served IOS during approximately the first two years of this action while he had promptly served and prosecuted this action against all defendants other than IOS and Cornfeld (A297A). As a result of plaintiff's delays in service, IOS was denied an opportunity to seek the deposition of a key former IOS officer because of his intervening death (A385A-394A). It has been noted to Judge Carter that his denial of IOS' motion to dismiss for failure to prosecute under these circumstances is in direct conflict with the decisions of this Court in Tradeways, Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir. 1965), Taub v. Hale, 355 F.2d 201 (2d Cir. 1966) and Messenger v. United States, 231 F.2d 328 (2d Cir. 1956) (A385A-389A).

If Judge Carter does not reverse his position and grant the stay of proceedings as requested, or does not certify any of those issues for appeal, it is IOS' present intention to seek review of those issues in this Court by petitioning for an appropriate extraordinary writ. If, by certification or otherwise, those issues come before this Court, appellant intends to request a consolidation of that proceeding with the present appeal, at least for purposes of oral argument. Nevertheless, it is submitted that it would be appropriate and desirable for this Court, in connection with this appeal concerning the subject matter jurisdiction issue, also to take cognizance of the important issues raised by IOS' Co-Liquidators in their stay and dismissal motions (see A192A-67-192A-118; 302A-392A), and it is respectfully suggested that this Court may wish to defer oral argument herein until all such other issues are finally determined by Judge Carter and may be consolidated with this appeal.

The Instant Appeal

In the order from which this appeal is taken, Judge Carter sustained jurisdiction over this securities fraud action in purported reliance on this Court's decisions in Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972) ("Leasco") and Schoenbaum v. Firstbrook, 405 F.2d

200, rev'd in part on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. Manley v. Schoenbaum, 395 U.S. 906 (1969) ("Schoenbaum").

However, as will be shown, Judge Carter's assertion of jurisdiction over the claims in this action cannot be reconciled with those decisions. There are not present in this case any of the critical jurisdictional facts which Leasco and Schoenbaum required as preconditions to the exercise of jurisdiction over extraterritorial securities transactions of the nature involved here. Thus, as will be demonstrated herein, Judge Carter sustained jurisdiction notwithstanding that he either expressly found, or it was undisputed, that:

-- the security involved (i.e., IOS common stock) was never listed on an American exchange nor traded in American markets (A56A; 60A; 65A; 76A; 192A-97; contrast Schoenbaum, 405 F.2d at 206; Leasco, 468 F.2d at 1334);

-- no misrepresentations or misconduct of any kind were made or committed in this country (A268A; 57A; 70A-71A; 99A-100A; 168A; 184A; 188A; 192A-103; contrast Leasco, 468 F.2d at 1334, 1335, 1336, 1337);

-- while the transactions in issue had some contacts with the United States, the conduct which occurred in this country consisted almost exclusively of preliminary meetings, among certain of the defendants, with respect to only one of the three offerings in issue, and were totally unrelated to the fraudulent conduct alleged in the complaint; moreover there were no contacts whatever between any of the defendants, on the one hand, and plaintiff or any member of his alleged class, on the other hand, in the United States (A263A-267A; 57A; 117A-119A; contrast Leasco, 468 F.2d at 1334, 1335, 1336, 1337);

-- all of the conductin the United States concerned transactions in which there were no purchases by Americans (A268A; 57A-59A; 114A-117A; 168A; 178A; contrast Leasco, 468 F.2d at 1337-38).

The decision below thus represents not a valid application of the principles of Leasco and Schoenbaum, but a radical and unjustified extension of them. Indeed, in rendering his Opinion below, Judge Carter himself expressly acknowledged that "there is a substantial ground for difference of opinion as to whether the ratio decidendi of the Leasco and Schoenbaum

cases were properly applied in the instant case" (A281A). Accordingly Judge Carter certified the issue of subject matter jurisdiction for an immediate appeal, pursuant to 28 U.S.C. § 1292(b) (A281A). On January 7, 1975, this Court granted the petitions for leave to appeal filed by IOS, as well as those filed by defendants-appellants Arthur Andersen & Co. ("Andersen") and Bernard Cornfeld, and ordered the three appeals consolidated for hearing and decision.

Issues Presented For Review

1. Whether the jurisdiction conferred on the federal courts by the United States securities laws extends to transactions in the securities of a foreign issuer, which securities are neither listed on an American exchange nor traded in American markets, where no fraudulent representations were made in this country and no other fraudulent or otherwise wrongful conduct was committed here.

2. Whether, for purposes of finding the requisite elements of subject matter jurisdiction in a securities law damage action on behalf of thousands of independent purchasers purchasing in three separate foreign offerings of securities, the District Court could properly "integrate" the three offerings.

3. Whether, assuming arguendo that a federal court has jurisdiction under the United States securities laws over the claims of an American purchaser of securities in a transaction of the above nature, it also has jurisdiction over the claims of purchasers who were citizens or residents of foreign countries, who made their purchases solely in foreign countries, and had no other contacts with the United States.

Statement of the Case

This action arises out of three separate foreign offerings of the common stock of IOS made in 1969, in which an aggregate of 11,000,000 shares were sold to tens of thousands of purchasers around the world. The three offerings were all consummated outside the United States by separate and independent groups of underwriters. In two of the offerings, no sales whatsoever were made to United States citizens or residents. In the third offering, which was made exclusively to employees and business associates of IOS, a small number of the IOS insiders who purchased were resident United States citizens.

A detailed account of the 1969 offerings and other factual matters relevant to this consolidated appeal is set forth in the brief of defendant-appellant Andersen, submitted simul-

taneously herewith. Counsel for Andersen, Cornfeld and IOS have jointly agreed to primarily rely on the Statement in the Andersen brief, in the interest of reducing the volume of papers before the Court. Accordingly, what follows here is only a summary of the relevant prior proceedings and facts. The Court is respectfully referred to the Andersen brief for a more detailed account.

The Complaint

In December 1971, plaintiff -- who had purchased 600 shares in the offering limited to IOS insiders -- instituted this action, on his own behalf and on behalf of all purchasers in all three offerings, seeking damages for alleged violations of the United States securities laws, including alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, and of § 17(a) of the Securities Act of 1933 (A5A).*

* Of course it is well-settled that the jurisdictional elements of a cause of action under § 17(a) are identical to those required under § 10(b). See e.g., Globus v. Law Research Service, Inc., 418 F.2d 1276, 1283-84 (2d Cir. 1969); Fox v. Prudent Resources Trust, [Current Binder] CCH Fed. Sec. L. Rep. ¶ 94,826 at 96,767-68 (E.D. Pa. 1974); cf. S.E.C. v. Texas Gulf Sulphur Corp., 401 F.2d 833, 867 (2d Cir. 1968), cert. denied sub nom. Coates v. S.E.C., 394

[Footnote continued on next page]

Plaintiff's complaint asserts that each of the separate prospectuses used in the three offerings in issue was false and misleading in that each failed to reveal certain material facts concerning IOS' finances, alleged illegal activities, and alleged chaotic bookkeeping, mismanagement and misuse of IOS moneys (A12A-16A).

The Plaintiff and His Class

At the time of the offerings, plaintiff was employed

[Footnote continued from preceding page]

U.S. 976 (1969) (Friendly, J., concurring). Plaintiff also alleged claims under § 12 of the Securities Act of 1933 (A5A). However, it is clear that these claims were time-barred when the complaint was filed and thus consideration of them is superfluous. Indeed plaintiff's complaint did not even plead compliance with the statutes of limitations applicable to claims under § 12, although it is well-settled that a Securities Act complaint must do so. See, e.g., Johns Hopkins University v. Hutton, 488 F.2d 912, 915-16 n.12 (4th Cir. 1973), cert. denied, 94 S. Ct. 1622, 1623 (1974); Ingenito v. Bermec Corp., 376 F. Supp. 1154, 1165 (S.D.N.Y. 1974); Chambliss v. Coca-Cola Bottling Corp., [1966-67 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,014, at 96,447 (E.D. Tenn. 1967); Newberg v. American Dryer Corp., 195 F. Supp. 345, 352 (E.D. Pa. 1961). Moreover the reason for this omission is plain; the action was brought more than one year after the challenged offerings were made -- so as to preclude a non-registration claim under § 12(1), see § 13 -- and was also brought more than one year after "the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence", since the complaint itself states that "within six months [of the offerings] these [IOS] shares were virtually valueless" (A11A) -- thus precluding an action under § 12(2), see § 13.

by an IOS-related company run by a member of IOS' Board of Directors, a Mr. Robert Sutner, who apparently was also a seller in the offering in which the plaintiff purchased (A42A-44A; 172A; 229A; 230A). For three year prior to his purchase the plaintiff had been employed by a different IOS-related company (A41A). It was by virtue of this long-term association with IOS that plaintiff was apparently permitted to and did purchase 600 shares of IOS stock in the offering which was limited to IOS employees and affiliated persons (A42A-44A; 47A-1-47A-2).

Notwithstanding plaintiff's insider status, and the fact that he bought a very limited number of IOS shares in only one of the three offerings, plaintiff has based his action herein on all of the three prospectuses pursuant to which the offerings in question were made (A10A; 12A-16A).

The Defendants

Plaintiff named as defendants herein the eight principal underwriters of the offerings in question, including Drexel Firestone, Inc., Drexel Harriman Ripley, Banque Rothschild, Hill Samuel & Co., Limited, Guiness Mahon & Co., Smith Barney & Co., Incorporated, J. H. Crang & Co. and

Investors Overseas Bank Limited.* Plaintiff also named Arthur Andersen & Co. (the international accounting firm which certified the financial statements employed in the prospectuses) and IOS and Bernard Cornfeld.**

Prior Proceedings

In April, 1972, plaintiff moved in the District Court for a class action determination (A48?-54A). On June 28, 1972, Judge Marvin E. Frankel ruled provisionally that the case could proceed as a class action on behalf of all purchasers in the three offerings involved herein (A81A-84A). Judge Frankel noted, however, that the question of whether

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* In another portion of the Opinion and Order from which this appeal is taken, Judge Carter dismissed defendant Crang from this action for want of personal jurisdiction, because the only contacts of Crang with the United States were meetings described by Judge Carter as "de minimis preliminary discussions [which] can hardly be considered acts out of which the cause of action arose" (A273A).

** Promptly after institution of the action in 1971 plaintiff served each of the underwriter defendants and Arthur Andersen. However, plaintiff made no attempt to serve appellant IOS until December, 1972, more than a year after the action had been commenced (A192A-69). But, as set forth in Judge Carter's Opinion, the 1972 service on IOS was clearly deficient (A276A-277A) and plaintiff did not attempt further service upon IOS until February, 1974. That latter service, although returned unopened to plaintiff's counsel with the marking "Addressee Unknown", has been upheld by Judge Carter as proper service upon IOS (A277A-278A) and is one of the matters raised in the motions for reargument or certification now pending before Judge Carter (see p. 5, supra).

there was subject matter jurisdiction under the federal securities laws over the claims herein was a difficult and close one, observing that the question would "merit extensive discovery" (A81A), and that while it was "entirely plausible to argue" that subject matter jurisdiction could be established, it was "by no means prudent to predict with confidence" that it could be (A82A).

Following Judge Frankel's decision, plaintiff engaged in extensive discovery on matters which he deemed relevant to the issue of subject matter jurisdiction (A85A-93A). At the conclusion of that discovery, motions to dismiss were made by several defendants on the grounds, inter alia, that the District Court lacked subject matter jurisdiction (A94A-95A; 107A-108A; 110A-111A; 150A-151A; 159A-160A).* In April, 1974, IOS, through its Co-Liquidators, made a limited and special appearance below also seeking to dismiss the action on the grounds, inter alia, that the Court lacked jurisdiction of the

* A number of these motions also sought to modify or vacate Judge Frankel's provisional class action determination and sought dismissals based on lack of personal jurisdiction. While the motions with respect to class action determination are still pending, Judge Carter has authorized the sending of certain notices to all purported members of the class in connection with a proposed settlement among plaintiff and some of the defendants (A285A). Because that authorization appears to constitute a class determination, IOS' co-appellants herein have also appealed from that authorization.

subject matter of plaintiff's claims, or alternatively, that the Court lacked subject matter jurisdiction over the claims of purchasers in the offerings who were neither citizens nor residents of the United States (A192A-64-192A-65).

The Facts

In connection with defendants' motions to dismiss the following relevant and undisputed facts were before the Court below:

IOS, the company whose common shares were sold in the three offerings, was at all times incorporated under the laws of foreign countries with active business offices in Geneva, Switzerland and other locations outside the United States (A56A-57A; 192A-97). IOS conducted no business in the United States (A56A-57A; 192A-97-192A-98).

At no time was IOS common stock listed on any United States stock exchange or traded in the securities markets of this country (A56A; 60A; 65A; 76A; 192A-97). In fact, in May 1967, IOS consented to an SEC order which prohibited IOS from engaging in any activity subject to the jurisdiction of the SEC and from making any sales of securities to United States citizens or nationals, except for sales outside the United States to "officers, directors and full time personnel of IOS

and its subsidiaries." (A192A-111; 192A-113). In connection with the three offerings at issue herein, IOS was in compliance with the aforesaid order, and at no time since has the SEC taken the position -- despite investigation by it -- that any part of the 1969 offerings violated the 1967 order (A78A; 154A; 192A-98-192A-99; 226A-234A).

The Drexel Offering

The first of the three offerings involved herein was underwritten by a group headed by defendant Drexel Firestone, Inc. (the "Drexel Group") and was known as "Drexel Offering". This offering involved a new issue of 5,600,000 shares of IOS stock (A168A) and was made and consummated primarily in Europe to Europeans (A256A) although it also included some sales in Asia and Australia (A175A). No sales were made to Americans (A268A; 57A-59A; 114A-117A; 168A; 177A).

The Drexel Group underwriters, in fact, took extensive precautions, which were fully effective, against there being any sales in the United States or to United States citizens (A268A; 55A-62A; 114A-117A; 168A; 177A). Although there were several preliminary meetings and other contacts in New York among members of the Drexel Group, Andersen and IOS (A263A-267A), none of these contacts involved any person who later purchased IOS stock, much less any of the alleged misrepresentations or other misconduct complained of by the

plaintiff herein. Indeed, virtually all of these meetings and contacts were had months before the offerings were made or the Drexel prospectus was drafted. Thus examination of the Drexel contacts in the United States, which formed the virtually exclusive bases for Judge Carter's finding of subject matter jurisdiction (A263A-267A), demonstrates that the chief purposes of such contacts were (a) to determine whether Drexel should participate in the underwriting at all, and (b) to initiate the necessary due diligence efforts required of an underwriter in connection with a public offering. (A detailed statement and analysis of these contacts, demonstrating their lack of jurisdictional significance, is set forth in connection with Point I of the legal argument below, see pp. 36-40 infra.)

The Crang Offering

The second offering involved here was underwritten by defendant J. H. Crang & Co. (the "Crang Offering"). This offering was a secondary distribution by IOS stockholders of 1,450,000 shares of previously issued IOS stock (A188A). This offering, like the Drexel offering, was conducted wholly outside the United States -- primarily in Canada -- and was in fact specially managed and sold to comply with all requirements of the Canadian securities laws and authorities (A65A; 67A-69A; 156A-158A). Indeed, the Crang prospectus was reviewed and cleared in its initial and final forms by the

ten provincial securities commissions of Canada as well (A69A).

No American citizen or resident purchased any shares in the Crang Offering (A66A; A69A-71A; 158A; 240A). Judge Carter summarized the Crang Offering as follows:

> Crang did not sell IOS shares to any American citizen, took precautions to prevent and placed restrictions on the sale to Americans, and understood that all other parties to the offering would observe similar restrictions (A274A).

Additionally, while Judge Carter noted that Crang had engaged in some preliminary contact with the United States regarding the offerings, he noted that such contacts were only "de minimis preliminary discussions" not "related to the alleged misleading statements and omissions in the prospectuses" (A273A). Crang was accordingly dismissed from the action (A280A).*

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* It would seem that Crang's lack of significant conduct within the United States should have also led to a finding that there is no subject matter jurisdiction at least with respect to any claims on behalf of purchasers in the Crang Offering. Since Judge Carter's basis for finding subject matter jurisdiction was "significant conduct" in the United States (A268A), it would seem logically inconsistent and totally erroneous for him to find subject matter jurisdiction regarding the Crang Offering when he found no significant conduct in the United States with respect to the Crang Offering.

The IOB Offering

The third offering involved here was a best efforts underwriting made through defendant Investors Overseas Bank Limited (the "IOB Offering"). This also was a secondary distribution by IOS stockholders of previously issued IOS stock, and consisted of 3,950,000 shares (A77A; 184A).

The IOB Offering, like each of the others, was also conducted and consummated outside the United States, and was subject to stringent precautions against sales in the United States (A78A-79A; 192A-107). This offering was, however, significantly different by reason of the fact that it was narrowly limited to a specific group of approximately 25,000 persons directly related to IOS by reason of employment or long standing business relationships with IOS (A184A; 77A-80A; 226A-234A). Although this offering was not made in the United States (A184A) and was not intended to reach United States citizens except to the limited extent permitted by the 1967 S.E.C. Order relating to IOS (A77A-80A) (see pp. 16-17, supra), a small number of resident Americans -- including plaintiff Howard Bersch -- did purchase a de minimis number of the IOS shares sold in the IOB Offering in conformity with the terms of the 1967 S.E.C. Order (A78A). The exact number of resident American purchasers has not been precisely determined but it appears that they do not exceed 37 and may be as

few as 11 (A73A; 79A; 234A). It is also significant that of those purchasers, at least four were also sellers in the IOB Offering and were therefore hardly in a position to complain that the IOB prospectus was false or misleading (A73A-74A).*

In sum, it appears that in all three offerings, involving between 40,000 and 100,000 purchasers,** a total of no more than 37 purchasers -- all of whom purchased only in the IOB Offering -- were resident Americans. Even as to them, purchases were consummated outside the United States (A79A; 192A-107). And, as indicated, each of them was affiliated with IOS in one way or another, and some were actually sellers in the same offering in which they purchased.

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* Additionally there were apparently some 360 non-resident American citizens who purchased in the IOB Offering (233A; 268A-269A). However, the sales to them were in full conformity with the 1967 S.E.C. Order (A78A), and are hardly a basis for jurisdiction since their purchases were clearly made overseas by their deliberate choice. Cf. Leasco, 468 F.2d at 1338.

** In his complaint, plaintiff alleged that he purported to represent 100,000 purchasers (A6A), and this figure was repeated by his counsel in connection with other proceedings had herein (A191A-192A). However, in his papers before this Court in opposition to the petitions for leave to take the instant appeals, plaintiff for the first time inferentially suggested that the actual number of purchasers may have been no more than 40,000, by stating that the number of present class members is approximately 20,000, and implying that this number represents one-half the number of original class members, i.e., all purchasers in the three offerings. Plaintiff-Appellant's [sic] Memorandum of Law in Opposition to Petition [sic] for Leave to Appeal, p. 11.

In addition to the foregoing it should be noted that none of the prospectuses in any of the three offerings was disseminated to any purchaser in the United States (A268A; 55-62A; 66A; 69A-71A; 114A-117A; 156A-158A; 168A; 177A; 192A-103), although some of the underwriters with American branch offices may have seen preliminary drafts in this country. Moreover, there is not one shred of evidence in the record of any contact in the United States, of any nature, between any defendant and plaintiff or any member of plaintiff's alleged class.

The Decision Below

Notwithstanding the foregoing facts Judge Carter determined in his Opinion and Order with respect to defendants' various motions to dismiss that, inter alia, subject matter jurisdiction existed over the claims of all purchasers in all three offerings, relying on what he characterized as the "flexible legal principles" which this Court allegedly applied in the Leasco and Schoenbaum case (A268A).

Essentially Judge Carter read those cases as holding that two basic elements were necessary to establish subject matter jurisdiction over the foreign offerings here in issue, namely (a) what he described as "significant conduct" in the

United States, and (b) purchases by American investors. However in order to find both these elements in the instant case, Judge Carter first found it necessary to conclude that the three offerings were so "integrated" as to make it appropriate to have "their prime movers collectively considered for purposes of subject matter jurisdiction" (A259A). Then, based upon this "integration" holding, he was able to find that the offerings involved purchases by some Americans (although as noted above, Americans purchased only in the IOB Offering) and that the offerings involved contacts with the United States (although again the record shows that the meetings and other contacts which were relied upon by Judge Carter were related only to the Drexel Offering, in which no Americans were purchasers). Thus, only by "integration" was Judge Carter able to establish a basis (even then a questionable one, as will hereinafter be seen) for subject matter jurisdiction.

Judge Carter also noted that while he deemed the United States contacts upon which he relied to be "significant" in toto -- though conceding that many of them "taken by themselves are of minimal significance" (A267A) -- they did not, like those in Leasco, include the making of any fraudulent misrepresentations to any purchaser in the United States (A268A).

Moreover, there is no finding by Judge Carter that any of the contacts relied upon by him was directly related to any of the fraudulent acts or omissions alleged by plaintiff in his complaint. And indeed not only Judge Carter's opinion but the record to which it cites indicates that as a matter of fact such contacts were totally unrelated to any alleged fraud.

Judge Carter, however, asserted that the domestic conduct (limited to the Drexel Offering) -- although not involving any misrepresentations or indeed any misconduct -- was jurisdictionally significant because it constituted an "essential link in the offering" (A267A) and "influenced and shaped the entire underwriting and offering, including the extent and quality of disclosure" (A268A). Nevertheless, as appears from even a cursory analysis of the contacts relied upon by Judge Carter, such contacts, while related to the offerings, were not an "essential link" in the alleged violations or, as a matter of fact, nor did they involve the making of any inducement to any purchaser, as required by Leasco. Moreover, to the extent that such contacts affected the extent or quality of disclosure,it is clear that the contacts were exclusively efforts to improve the quality of disclosure, and not one bit of evidence indicates that there was any attempt in any of the contacts referred to by Judge Carter to withhold information or otherwise mislead purchasers in the

offerings. (See pp. 35-40, infra).

Appellant IOS had also argued below, alternatively, that even if claims of resident American citizens can be brought within the subject matter jurisdiction of the District Court, there is no basis for finding subject matter jurisdiction over claims of foreign purchasers who were neither citizens nor residents of the United States (A192A-106-192A-108). Judge Carter's decision did not specifically express any view on this alternative argument, although clearly it was rejected in his conclusions.

ARGUMENT

POINT I

THE DISTRICT JUDGE MISREAD THE DECISIONS OF THIS COURT IN LEASCO AND SCHOENBAUM. UNDER THE PRINCIPLES APPLIED IN THOSE CASES, THE DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION.

In denying appellants' motions to dismiss for lack of subject matter jurisdiction, as noted above, the District Court purported to apply the principles underlying this Court's decisions in Schoenbaum and Leasco. However, it is respectfully submitted that the judge below erred in his reading of both cases. His conclusion that jurisdiction is present under those cases must be reversed.

A. IOS Common Stock was Not Listed On An American Exchange; Therefore There is No Jurisdiction Under Schoenbaum.

In the Schoenbaum case this Court stated:

> We hold that the district court has subject matter jurisdiction over violations of the Securities Exchange Act although the transactions which are alleged to violate the Act take place outside the United States, at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interest of American investors. (Emphasis added.)
>
> --405 F.2d at 208

The thrust of the Schoenbaum case was thus the presence of both (a) detriment to American investors and (b) a stock registered and listed on a United States securities exchange. In the instant case, even assuming arguendo a sufficient showing of detriment to American investors, it is clear that the stock in issue was not registered or listed on a United States exchange (A56A; 60A; 65A; 76A; 192A-97). Under the circumstances there would appear to be no ground for deeming the Schoenbaum decision applicable here.

B. The District Court Specifically Found No Misrepresentations Or Other Fraudulent Conduct In This Country; Therefore There is No Jurisdiction Under Leasco.

The District Judge's application of Leasco is equally erroneous.

Thus Judge Carter purported to apply the ratio decidendi of Leasco to the instant case, although he specifically found that "the ultimate representations or inducements do not appear to have occurred in the United States, as was true in Leasco" (A268A), and the record discloses that all purchases by plaintiff and his alleged class were consummated outside the United States (A79A; 192A-107). Given these facts, it is respectfully submitted that the only proper way for Judge Carter to have "applied" Leasco would have been to dismiss the complaint for lack of jurisdiction.

Thus, in Leasco this Court, while extending the Schoenbaum decision to a situation where a stock was not listed on a United States exchange or otherwise traded in the American market, specifically decided that "substantial misrepresentations", or other fraudulent conduct, must have been made or committed in this country before the United States securities laws -- and specifically § 10(b) of the Exchange Act -- could be applied to an extraterritorial transaction, even by an American investor.* Time and again the Leasco opinion emphasized that the making of misrepresentations

* Here, of course, there is the added problem that plaintiff seeks to sue on behalf of thousands of non-Americans as well. Whatever may be plaintiff's rights as a resident American citizen, it seems clear that his foreign class members cannot properly invoke the jurisdiction of the federal courts. (See Point III, infra).

here is a jurisdictional prerequisite in such a case. See, e.g., 468 F.2d at 1334, 1336, 1337. At one point the Leasco Court specifically stated:

> If all the misrepresentations here alleged had occurred in England, we would entertain most serious doubt whether, despite United States v. Aluminum Co. of America, 148 F.2d 416, 443-444 (2 Cir. 1954), and Schoenbaum, § 10(b) would be applicable simply because of the adverse effect of the fraudulently induced purchases in England of securities of an English corporation, not traded in an organized American securities market, upon an American corporation whose stock is listed on the New York Stock Exchange and its shareholders. * * * When no fraud has been practiced in this country and the purchase or sale has not been made here, we would be hard pressed to find justification for going beyond Schoenbaum. (Emphasis added.)
>
> --468 F.2d at 1334

Moreover, not only the language but the logic of Leasco likewise dictates that the making of misrepresentations in the United States is a fundamental jurisdictional requirement in a case that does not come within the Schoenbaum rule. Thus in Leasco, this Court analyzed the jurisdictional issue in terms of whether Congress had intended to extend the anti-fraud protections of Section 10(b) to a transaction involving the securities of a foreign issuer and having extensive and highly significant foreign contacts. While noting that Congress had presumably not specifically thought about the

extent to which Section 10(b) should be given extraterritorial effect, the Leasco Court was guided by its best judgment of the legislative purpose in enacting that provision, and its understanding of the relevant legislative history. See 468 F.2d at 1335-37. Based on that analysis, the Leasco Court concluded that

> while *** we doubt that impact on an American company and its shareholders would suffice to make the statute applicable if the misconduct had occurred solely in England, we think it tips the scales in favor of applicability when substantial misrepresentations were made in the United States. (Emphasis added.)
>
> -- 468 F.2d at 1337

The Leasco Court's very careful statutory analysis was obviously undertaken in part because of an initial presumption against assuming jurisdiction in clearly extraterritorial transactions, a presumption supported by the strong interest in comity and international harmony which Congress must be deemed to respect when it legislates in a multinational context. As Judge Frankel wrote in an earlier case on just this point:

> [Absent a significant domestic impact,] United States courts have no reason to become involved, and compelling reason not to become involved in the burdens of enforcement and the delicate problems of foreign relations and international economic policy that extraterritorial application may entail.

Investment Properties International, Ltd. v. I.O.S., Ltd., [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep ¶ 93,011, at 90,735 (S.D.N.Y.), aff'd without opinion (unreported 2d Cir. 1971).* Cf. Scherk v. Alberto-Culver Co., U.S. , , 94 S. Ct. 2449, 2456 & n. 11 (1974).

In sum, the logic of the Leasco decision is very straightforward: the securities laws do not confer jurisdiction except as Congress intended. When Congress enacted Section 10(b) as part of the securities laws, it meant to protect against fraud or fraudulent misconduct in this country; thus where misrepresentations have been made in this country, application of Section 10(b) is consistent with Congress's intent in enacting it, even where the transaction induced by that misconduct is consummated overseas. However, where there has not been such fraudulent misconduct in this country, and the security in question is not listed or traded in this country, the statute confers no jurisdiction. As this Court stated:

> The language of Section 10(b) is much too inconclusive to lead us to believe that Congress meant to impose rules governing conduct throughout the world in every instance where an American company [or, presumably, an individual American] bought or sold a security.
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> --468 F.2d at 1337

Moreover, the conclusion that Leasco was intended to be limited to situations involving substantial misrepresentations or fraudulent conduct in this country has been

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* This Court's unreported affirmance of Judge Frankel's decision is mentioned in its decision of another issue in the same case, 459 F.2d 705, 706 n.1 (2d Cir. 1972).

reached in every reported case of which appellant is aware which has decided this issue since Leasco (other than the instant decision by Judge Carter and a decision by Judge Stewart in ITT, et al. v. Vencap, Ltd., et al. which is also before this Court on appeal (Docket Nos. 74-1969-2341-2366)). Accordingly all other such cases have upheld jurisdiction in a foreign offering context only where actual misrepresentations were in fact made in the United States. See, e.g., Travis v. Anthes Imperial Ltd., 473 F.2d 515, 526 (8th Cir. 1973), where the court stated: "Here, as in Leasco, the scales are tipped in favor of applicability because misrepresentations were made in the United States." (Emphasis added.) See also Madonick v. Denison Mines Ltd., [1973-74 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 94,550, at 95,909 (S.D.N.Y. 1974) ("Here, as in Leasco and Travis, the misrepresentations, albeit by proxy, were made in the United States"); Garner v. Pearson, 374 F. Supp. 591, 598 (M.D. Fla. 1974); S.E.C. v. United Financial Group, 474 F.2d 354, 356 (9th Cir. 1973).

Additionally it should be noted that the requirement of actual misrepresentations also is consistent with well-reasoned decisions prior to Leasco itself. See, e.g., Investment Properties International, Ltd. v. I.O.S. Ltd., supra, [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep., at 90,736-37 ("So far as our securities laws are concerned, no significant

events -- no representations or inducements -- are shown to have occurred within the United States"); Finch v. Marathon Securities Corp., 316 F. Supp. 1345, 1349 (S.D.N.Y. 1970).

Notwithstanding all of the foregoing, in the instant case the District Court brushed aside the contention that Leasco required that substantial misrepresentations have been made in the United States before jurisdiction could be exercised in a case such as this. Judge Carter, in fact, characterized that contention as "myopic", and stated that it confuses "the limited fact pattern in Leasco with the broader and more flexible legal principles which the [Leasco] court applied" (A267A-268A). However, not only did Judge Carter thereby ignore the clear language of Leasco, but he also ignored the basic logic and legal principles applied therein -- i.e. that the statute can be applied only after determining that Congress intended it to apply, and that in a case involving securities of a foreign issuer not listed on an American exchange, it is necessary that "fraud has been practiced in this country." 468 F.2d at 1334 (emphasis added).

Indeed it is evident from the very language of Judge Carter's decision that he ignored the basic thrust of the Leasco analysis. Thus, for example, Judge Carter's opinion states that: "The crux of the jurisdictional basis in Leasco

was the finding of 'significant conduct within the territory.'" (Citing Leasco, supra, at 1334) (A268A). But even a glance at the cited page of the Leasco Opinion will confirm that the context clearly indicates that by jurisdictionally "significant conduct", this Court was referring to fraudulent conduct. See 468 F.2d at 1334.*

Moreover, and more fundamentally, even if this Court meant to somehow distinguish between "significant conduct" and "fraudulent conduct", the discussion at p. 1334 concerned not the "crux of the jurisdictional finding in Leasco", -- i.e., whether Congress intended that Section 10(b) be applied in a case involving no domestic fraudulent conduct -- but rather the separate question, clearly distinguished by this Court, of whether the exercise of jurisdiction in such a case was, in the first instance, even permitted under principles of foreign relations law. Thus while deciding that foreign relations law would pose no bar to legislation if there has been "significant conduct within the territory" -- the phrase seized upon by Judge Carter -- the Leasco Court in the next breath specifically noted that: "[I]t would be equally erroneous to assume that the legislature always means to go to the full extent permitted."

* This is emphasized by the example set forth in the footnote of the Leasco opinion which specifically refers to a "misrepresentation" in the jurisdiction asserting authority. 468 F.2d at 1334 n.3.

already indicated, the Leasco decision went on to hold that Congress intended that there be United States jurisdiction only where there was "fraudulent" conduct in this country.

Thus Judge Carter erroneously attributed jurisdictional significance to conduct which Congress could not conceivably have considered would warrant the application of an American antifraud rule to a foreign transaction -- i.e., the meetings and other dealings between and among the Drexel Group and IOS relating to Drexel's decision to make the European underwriting and the Drexel Group's attempt to assure (not avoid) full disclosure. Judge Carter seems to have treated these contacts as the jurisdictional equivalents of "substantial misrepresentations" although he concedes in his opinion, and the record clearly shows, that: (a) they did not entail the making of fraudulent representations to plaintiff or any other purchaser in this country; (b) indeed they did not involve any communications between the defendants and plaintiff or any member of his alleged class in this country; and (c) they did not involve the formulation of any fraudulent scheme in this country.

Judge Carter did not find that any of these meetings and other contacts -- as described in plaintiff's own evidence -- involved any wrongful conduct, even taking the

broadest view of what Leasco requires in the way of such misconduct. Certainly none of them involved any plan or scheme to conceal the various facts which plaintiff claims should have been disclosed in the prospectuses. Contrast S.E.C. v. United Financial Group, supra, 474 F.2d at 356, 357 (9th Cir. 1973); Wandschneider v. Industrial Incomes Inc. of North America, [1972-73 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,422, at 92,057, 92,059-60, 92,064, 92,065 (S.D.N.Y. 1972).

Indeed, to the contrary, Judge Carter himself accurately describes many of these meetings and other contacts as simply comprising "much of the effort that went into the due diligence report" (A267A) or merely as "preliminary discussions" related only to Drexel's decision about whether to participate in the European offering (A264A). Never does Judge Carter say -- nor could he say -- that these meetings or other contacts involved the formulation of any fraud or misrepresentation alleged by the plaintiff in his complaint. Actually, for all that appears from Judge Carter's opinion -- and indeed from plaintiff's extensive record developed in his discovery on the subject matter jurisdiction issue -- the meetings and other contacts were in substance exclusively examples of "due diligence" by the Drexel group, designed to assure the accuracy of disclosures ultimately made in the Drexel prospectus and not to conceal facts or otherwise commit a fraud. An

examination of the specific meetings and contacts relied upon by Judge Carter in his opinion will readily demonstrate the foregoing.

Thus, for example, Judge Carter relies upon two meetings in March and April of 1969 (more than five months prior to the consummation of the offerings in question) among representatives of defendant Drexel, an affiliate of defendant Guinness Mahon & Co., Limited and IOS at Drexel's New York offices during which the Drexel offering (which at that time was merely being "proposed") was "discussed" (A263). While Judge Carter refers to documents 1 and 2 of the plaintiff's Appendix II (which had been attached to his papers in opposition to the defendants' motions regarding subject matter jurisdiction (A192A-119; 193A)), on their face those documents indicate that the discussions were merely part of the preliminary process by which Drexel "[got] acquainted with the I.O.S. organization" (A193A).

Judge Carter's reference to meetings engaged in by representatives of Drexel's New York law firm with an executive officer of IOS and two representatives of Drexel in New York (A264A) is equally insignificant. All that is established from these meetings is that there was a "discussion" of, "inter alia, the listing of the shares, locations of the offering, and tax problems of IOS officials" (A264A). Again no connection to any alleged fraud is established.

Judge Carter next refers to meetings with SEC officials with respect to the offering (A264A). But, again, a reference to the supporting documents, i.e., documents 6, 8 and 44 of plaintiff's Appendix II (A193A-1; 196A; 214A) demonstrates that these meetings were actually the antithesis of fraudulent conduct by the parties involved and rather were clearly related to efforts to assure full disclosure of facts. It is particulary noteworthy that the meetings with officials of the SEC were not only unrelated to charges of misconduct made in the complaint, but insofar as the Drexel prospectus is concerned actually formed part of the basis for a lengthy and detailed discussion therein with respect to IOS' prior dealings with the SEC (Drexel prospectus, pp. 28-29).

Judge Carter's reliance upon Drexel's retention of Price Waterhouse & Co. in New York to act as a financial consultant in the offering (A264A) is equally innocuous. Thus, Judge Carter himself refers to this retention and certain subsequent actions as being undertaken to "help investigate IOS" and as being "part of the due diligence report" (A264A). But again it is clear from the documents relied upon by Judge Carter that the activities of Price Waterhouse were only designed to assure the fullest and most accurate disclosure possible -- and in particular to learn as much as

possible about past audits of IOS and about IOS' dealings with the S.E.C. (A195A-3-195A-5; 208A-1-208A-29).

Judge Carter's subsequent references to Price Waterhouse's "review of some of the Arthur Andersen work papers involved in [Andersen's] earlier work in IOS" again merely demonstrate further efforts to assure that Drexel could have confidence in IOS' financials, and do not remotely prove that this review in any way led to the omission or misrepresentation of facts or figures in the Drexel prospectus.

A reference to a meeting between Mr. Bertram Coleman of Drexel and an officer of IOS (A265A) is also jurisdictionally irrelevant, not only because it did not involve misconduct, but because, as the cited deposition testimony of Mr. Coleman indicates, "the substance of it was that we were going to send this team to Geneva [to prepare the prospectus and manage the underwriting] and that we wanted to enter into a firm agreement with him or a reasonably firm agreement when we got to Geneva" (A208A-61) (emphasis added). Thus, this meeting proves only that the parties intended that the offerings be foreign transactions.

A further meeting in New York on July 11, 1969 cited by Judge Carter (A265A) not only supplies no support for the assertion of jurisdiction but actually undercuts a major

allegation of the complaint -- i.e., that Andersen knowingly allowed the 1968 IOS financials to be included in the September 1969 prospectus without making a reasonable investigation to determine if the lapse of time made them misleading (A17A) -- since that meeting consisted largely of discussion about the additional intensive post-audit review which Andersen would perform (A208A-91).

There is also no jurisdictional significance under Leasco to the meeting at which representatives of Price Waterhouse, Shearman & Sterling, and Drexel "discussed a preliminary draft of a report by Price Waterhouse to Drexel that included questions about practices engaged in by I.O.S., and Arthur Andersen's financial report on the company" (A265A). Thus the mere fact that questions were raised in Price Waterhouse's report, in and of itself, indicates only that Drexel's due diligence effort was extensive; moreover the plaintiff's own evidence indicates that Price Waterhouse "felt they got satisfactory answers" to the questions (A208A-93).

A further irrelevant citation by Judge Carter is his reference to the fact that lawyers representing Drexel and IOS met in New York on the day before the Drexel Offering was to commence and "drafted a sticker to be attached to the prospectus regarding [an] SEC investigation" which had been

reported in the press (A265A-266A). Clearly the addition of this sticker was part of an effort to make full disclosure about IOS -- even about IOS' legal problems -- not to conceal or mis-state the facts.

It would serve no useful purpose to multiply the foregoing examples. Examination of every other contact relied upon by Judge Carter will likewise demonstrate that, from a jurisdictional standpoint, the events which took place in this country were totally innocuous. Moreover, the lack of jurisdictional significance in the contacts relied upon by Judge Carter appears even more clearly when contrasted with the very substantial events and conduct in connection with the Drexel offering which took place outside the United States. (Appellant Andersen has described the events and contacts which took place abroad at length in its brief submitted simultaneously herewith.) Yet Judge Carter, while giving a detailed and extensive account of the insignificant American contacts, slights or altogether ignores the basic steps in the Drexel offering which were taken abroad.

Comparison of the overseas conduct and the domestic conduct demonstrates that the latter was devoid of any conceivable jurisdictional significance except for the fact that it

occurred in New York or elsewhere in the United States. But as already indicated herein the Leasco approach is not to focus merely on where specific conduct occurred, but rather on what the conduct consisted of. Was it or was it not fraudulent?

Indeed Judge Carter's factual discussion graphically demonstrates the weakness and inadequacy of the legal standard -- "significant conduct" -- which he purported to apply. Instead of making a detailed and critical analysis of each of the contacts upon which he relied, to establish a direct connection between such contact and the illegal conduct specifically complained of by the plaintiff, Judge Carter merely characterized the totality of the contacts as being in a general way "significant." The vague standard of "significant conduct" -- with no specification of what makes conduct "significant" or not -- manifestly does not provide adequate guidance in deciding whether specific cases fall within the jurisdiction conferred by the securities laws, or outside it.

In this connection certain specific adverse consequences of imputing jurisdictional significance to the "preliminary research undertaken by Drexel prior to committing itself" (A264A-265A) should be noted. Thus adoption of

Judge Carter's view that the securities laws apply to transactions solely because such preliminary meetings are held in this country, would have the wholly undesirable consequence of making it literally impossible for an American issuer to make a foreign offering of its securities without going through the burdensome and expensive process of registration under the Securities Act. Thus such offerings are of course always "conceived" and "decided upon" in the United States; yet it has never been asserted -- until Judge Carter's decision in the instant case -- that decisions arrived at in this country to make offerings in other countries would subject the decision-makers to the American securities laws.

On the contrary, notwithstanding that the decision by an American issuer to make a foreign offering is always reached in this country, the Securities and Exchange Commission has issued a release specifically providing that foreign offerings by American issuers shall be exempt from registration. S.E.C. Release No. 33-4708 and No. 34-7366, 17 C.F.R. § 231.4708, 1 CCH Fed. Sec. L. Rep. ¶ 1362 (1964).* Yet

* In this Release the S.E.C. states that the exemption is available regardless of "whether the offering originates from within or outside of the United States, whether domestic or foreign broker-dealers are involved and whether the actual mechanics of the distribution are effected within the United States, so long as the offering is made under circumstances reasonably designed to preclude distribution or redistribution of the securities within, or to nationals of, the United States." There can be no question that the 1969 offerings -- even if they had been made by an American issuer -- would have satisfied these guidelines (A268A; 55A-62A; 114A-117A; 168A; 177A).

Judge Carter's finding of jurisdictional significance in the meetings leading to Drexel's decision to underwrite the European offerings, if sustained, would mean that a foreign offering by a foreign issuer will be held subject to the United States securities laws in circumstances where the S.E.C. has stated that an offering by an American issuer would not be. This conclusion is, simply, untenable.

Although, as noted, Judge Carter did not characterize any of the foregoing or other activities carried out in the United States as fraudulent or wrongful in any respect, he nonetheless attempted to bring them within the Leasco opinion by characterizing them as "an essential link in the offering" (A267A) or, "although less direct than that in Leasco, an 'essential link' in inducing the ultimate purchases" (A268A). Compare 468 F.2d at 1335. However, in this regard as well, it is submitted that Judge Carter misread the Leasco decision.

Thus while Leasco used the phrase "essential link" quoted by the Court below, Leasco clearly refers to a dual requirement that (a) there be wrongful conduct shown to have occurred in the United States which (b) is also shown to

have caused or induced the plaintiff to enter the transaction. In other words a finding that conduct was an "essential link" does not excuse a prior finding that such conduct was fraudulent or wrongful. As the Leasco court stated, in explanation of the "essential link" phrase: "Putting the matter in another way, if defendant's fraudulent acts in the United States significantly whetted Leasco's interest in acquiring Pergamon shares," principles of foreign relations law would not preclude the assertion of jurisdiction by an American court. 468 F.2d at 1335 (emphasis added).

In the instant case, of course, as already set forth in detail, none of the conduct alleged to be an "essential link" was in any way fraudulent or otherwise wrongful. In addition, even if the United States conduct was somehow deemed to be wrongful Judge Carter could not have demonstrated that it "significantly whetted" any purchaser's interest in acquiring IOS' shares. Indeed, even though Judge Carter makes the conclusory statement that the conduct relied upon by him was an "essential link in inducing the ultimate purchases", he has nowhere expanded upon that statement or supplied any specific factual support therefor. Nor could he do so, for as already seen, none of the conduct in question in any

way related to any communications -- direct or indirect -- by any defendants with any purchasers, much less any attempts to "induce" purchases by them.

* * * *

In sum, the domestic conduct found by the Court below is not jurisdictionally significant, under Leasco, Schoenbaum or otherwise. Here, as in Finch v. Marathon Securities Corp., supra, 316 F. Supp. at 1349, where there has been no showing of fraudulent conduct and the transaction is almost exclusively foreign in all other respects,

> it would appear that the district court is without subject matter jurisdiction, despite the existence of other, less meaningful American-based facts and events.

See also Investment Properties International, Ltd. v. I.O.S., Ltd., supra, [1970-71 Transfer Binder] CCH Fed. Sec. L. Rep., at 90,736-37.

Thus, it is respectfully submitted, the District Court lacks jurisdiction over this action and the complaint should be dismissed.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT THE THREE OFFERINGS SHOULD BE "INTEGRATED" TO ENABLE PLAINTIFF TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF LEASCO.

A second substantial error in Judge Carter's decision below arises from his holding that the three offerings in issue "were so integrated as to have their prime movers collectively considered for purposes of subject matter jurisdiction" (A259A).

In certifying the subject matter jurisdiction issue for an interlocutory appeal, Judge Carter correctly stated that his "integration" holding was the "basis" of his ultimate finding of jurisdiction (A281A). What Judge Carter seemingly meant was that, in the absence of such "integration", not even plaintiff Bersch (much less the thousands of foreign purchasers in plaintiff's alleged class) could satisfy the jurisdictional test purportedly established by Leasco and applied by Judge Carter, which requires both (a) an American investor and (b) jurisdictionally "significant conduct" in the United States. Thus, as noted earlier, Judge Carter found allegedly "significant conduct" in the United States relating exclusively to the Drexel Offering -- in which there were no American investors -- but found American

investors only in the case of the IOB Offering -- which involved no conduct in the United States.* Accordingly, unless at least the Drexel and IOB Offerings are "integrated", plaintiff clearly cannot satisfy both of the alleged jurisdictional prerequisites even with respect to his own claim.

Judge Carter purported to leap this further jurisdictional hurdle by erroneously adopting plaintiff's convenient and self-serving -- but totally fallacious -- argument that the three offerings constituted an "integrated entity".

Judge Carter's error in adopting plaintiff's "integration" argument is evidenced by his own opinion which candidly admits that the offerings "can be viewed" as one, two or three distinct offerings, depending on which aspects of the offerings one "focuses on" (A255A) (emphasis added), but never confronts the basic question of which aspects of the offerings were jurisdictionally significant.

Thus, while there were substantial similarities in the three offerings from which one could conveniently argue that the conduct of the various defendants should be "collectively considered" -- as Judge Carter did -- those similarities were not at all jurisdictionally significant. Rather, it

* In the third offering, i.e., the Crang Offering, there was no finding of either American investors or of "significant conduct" here. Indeed, Crang's contacts with the United States were so minimal that Crang was dismissed below for want of personal jurisdiction (A280A).

would seem that the respects in which the offerings differed -- which Judge Carter ignored or unreasonably discounted -- were in fact the jurisdictionally significant ones.

Thus, for example, it would seem particularly jurisdictionally significant -- in light of the basic jurisdictional consideration that the gist of this action is allegedly fraudulent sales -- that each of the offerings was made to entirely different groups of purchasers. Thus, the Drexel Offering involved sales only to European, Asian and Japanese investors (A175A; A256A); the Crang Offering on the other hand involved sales only to Canadians (A65A; 67A-69A; 156A-157A); and the IOB Offering was specifically made only to a group of 25,000 IOS-related persons (A184A; 77A-80A; 226A-234A).

It is also jurisdictionally significant that each of the offerings was made by distinctly different sellers and through distinctly different underwriting groups, each of which had independent control over its own transaction.

It is further significant that the Crang prospectus was distinctly different from the prospectuses used in the Drexel and IOB Offerings, not only because of the independence of the three underwriting groups, but because the Crang Offering was regulated by the 10 provincial Canadian securities commissions (A69A; 156A-157A).

While each of the foregoing dissimilarities is clearly significant in a jurisdictional sense, it is respectfully submitted that the similarities relied upon by the District Court to justify "integration" for jurisdictional purposes really have no jurisdictional significance whatsoever. Thus, for example, the fact relied upon by Judge Carter, that the same financial statements were used in connection with each offering (A256A), merely reflects the simple reality that each of the offerings was of common stock of the same company. Likewise, to the extent that the texts of the prospectuses were similar, this too merely reflects the reality that they describe the operations and condition of the same company.*

The error in Judge Carter's "integration" holding is further indicated by the fact that the only legal authorities cited by Judge Carter in support of that holding are two "aider and abettor" cases, which he described as "supportive of the integrated offering thesis" (A259A). But,

* All other evidence relied upon by Judge Carter with respect to his "integration" holding was designed to demonstrate that there was some "relatedness of purpose" among the defendants. However, even Judge Carter recognized that this was "difficult to document" (A259). Despite this difficulty, Judge Carter proceeded to say that "sufficient ties have been demonstrated" to support the integration theory (A259), thereby implying that some standard of "sufficiency" less than adequate "documentation" is appropriate. It is submitted however that without documentation ties cannot be deemed sufficient. Indeed the evidence must be substantial, particularly when it relates to a matter as fundamental as jurisdiction over a clearly extraterritorial securities transactions. (See also discussion re Bankers Life case, pp. 50-51, infra.)

it is submitted, the considerations relevant to imposing "aider and abettor" liability in a case clearly within a court's jurisdiction are worlds removed from those relevant to deciding if there is jurisdiction over foreign transactions having only questionably relevant contacts with the United States, and as to which there is therefore a presumption against assuming jurisdiction. (See pp. 29-30, supra.)

Indeed, the fallacy in Judge Carter's use of the integration holding to establish jurisdiction was specifically noted in one of the very aider and abettor cases relied upon by him. Thus, in S.E.C. v. National Bankers Life Ins. Co., 324 F. Supp. 189, 194 (N.D. Tex. 1971), cited by Judge Carter (A259A), the Court stated that: "it must first be determined if any individual violations have been committed before determining joint liability under the theories of conspiracy or joint scheme". The Bankers Life court went on to criticize and reject the very approach urged by plaintiff and adopted by Judge Carter in the instant case -- namely, asserting in the first instance -- before the basic elements of a violation have been established -- the existence of something akin to a conspiracy or joint scheme, in order to impute the conduct of one defendant or group of defendants (in this case the United States conduct of the Drexel Group) to another group of defendants (in this case the IOB and Crang defendants). Thus the Bankers Life court stated:

> The SEC has brought suit against a number of defendants that allegedly committed a wide variety of acts. The SEC has sought to paint them all with the same broad brush -- claiming that the various activities have made each defendant part of a conspiracy to sell unregistered stock and part of a scheme to defraud. Because of this alleged combined activity, the SEC sought to hold them all jointly liable. In so doing, the SEC, however, failed to distinguish one defendant from the other and failed to properly delineate individual violations. Thus, in its rush to establish joint liability it failed to lay proper groundwork for its case.
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> --324 F. Supp. at 197

It is respectfully submitted that if Judge Carter had merely substituted the words "plaintiff, Howard Bersch" for "SEC" in this passage, he would have reached the proper result of completely rejecting plaintiff's "integration" theory -- as the jurisdictional facts before him plainly required.

Not only are the "aider and abettor" cases thus not "supportive" of the integrated offering thesis, but more closely analogous legal doctrines do not support it either. Thus if analogies are useful in deciding whether the offerings in issue should be integrated for jurisdictional purposes, the District Court might more fruitfully have considered that such integration is really akin to the "aggregation" of claims to satisfy the jurisdictional amount requirement in certain federal cases -- a practice which the Supreme Court has consistently refused to allow. See, e.g., Snyder

v. Harris, 394 U.S. 332, 335-37 (1969); Clark v. Paul Gray, Inc., 306 U.S. 583, 588 (1939); Pinel v. Pinel, 240 U.S. 594 (1916); Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40 (1911).

POINT III

THERE IS NO SUBJECT MATTER JURISDICTION OVER THE CLAIMS OF FOREIGN PURCHASERS WHO BOUGHT THE STOCK OF IOS, A FOREIGN ISSUER, IN FOREIGN COUNTRIES.

It is undisputed herein that virtually all of the purchasers in the 1969 offerings were citizens and residents of foreign countries whose purchases were in fact made abroad, without any basis for expecting that the United States securities laws would apply to their purchases, and further that even most of the few Americans who bought -- only in the IOB Offering -- were foreign residents who purchased their shares abroad -- likewise with no basis for expecting that American law would apply to such purchases.* Appellant therefore

* Thus the Drexel prospectus included the following language:

> The Common Shares offered by this prospectus are not registered under the United States Securities Act of 1933 and are not being offered in the United States of America or any of its territories or pos-

[Footnote continued on next page]

contended below that, even assuming arguendo that jurisdiction might somehow exist in this case in favor of a resident American purchaser, such as plaintiff Bersch, the District Court plainly lacked jurisdiction over claims arising out of the wholly foreign purchases by citizens or residents of foreign countries (A192A-106-192A-108). The District Court did not specifically respond to this alternative argument, although it was implicitly rejected by the Court's decision upholding jurisdiction not only over plaintiff's claim herein, but over the claims of all members of his purported class, which

[Footnote continued from preceding page]

> sessions or any areas subject to its jurisdiction (the "United States") or in Canada or Mexico; or to nationals or citizens of or persons resident or normally resident in the United States or to certain other persons and organizations described under "Underwriting". (A168A)

The IOB prospectus contained substantially the same restrictive language except that it noted that it was being offered only to certain IOS affiliated persons (A184A). The Crang prospectus specifically stated that "this prospectus constitutes a public offering of these securities for sale only in those [Canadian] provinces where a prospectus has been filed" (A188A). Under these circumstances it can hardly be said that purchasers pursuant to these prospectuses could have been relying on the protection of United States securities laws. The significance of this point is heightened by the clear implication in Leasco that a purchase of securities which is "deliberately and unilaterally . . . consummated abroad by a foreigner" would not be within the jurisdiction of the United States courts. 468 F.2d at 1338.

class (if sustained) consists almost exclusively of such foreign purchasers (A268A-269A).

The error in Judge Carter's decision in this latter regard is evidenced most clearly by a substantial line of cases which clearly hold that foreign purchasers in a foreign offering of the nature involved herein could not, on their own, invoke the jurisdiction of the federal courts. See, e.g., Finch v. Marathon Securities Corp., supra; Investment Properties International, Ltd. v. I.O.S., Ltd., supra; Sinva v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 48 F.R.D. 385, 386 (S.D.N.Y. 1969).* Since it is also clear that the claims

* Although these authorities were presented to the Court below by appellants and the other defendants, they are neither distinguished nor even cited in its Opinion. Moreover the Leasco case, so heavily relied upon by Judge Carter, itself strongly suggests that this Court approves these decisions. Thus in Leasco the precise question of whether a non-citizen could sue under Section 10(b) was raised (the purchases at issue therein having been paid for by a Netherlands Antilles subsidiary of the American corporate plaintiff), see 468 F.2d at 1332, 1337-38. Only after finding that the foreign subsidiary "was accepted by both sides as the alter ego of the American", id. at 1338, did this Court decide that there was jurisdiction over Leasco's claims. The discussion leading to this conclusion -- and in particular this Court's statement of a hypothetical case involving a German and a Japanese businessman meeting in New York to discuss purchases later made overseas -- strongly intimates that this Court would not have found jurisdiction had the purchase been made by a foreigner in a foreign country. (See also fn. pp. 52-53, supra.) In any event Leasco surely gives no support whatever to the contrary conclusion reached by the District Judge in this case.

asserted here are several and independent -- not joint -- it is clear that, jurisdictionally, each must stand on its own. See, e.g., Snyder v. Harris, supra, 394 U.S. at 335-36; Givens v. W. T. Grant Co., 457 F.2d 612, 613-14 (2d Cir.), vacated on other grounds, 409 U.S. 56 (1972); cf. Bass v. Rockefeller, 331 F. Supp. 945, 950 (S.D.N.Y. 1971). Accordingly, it is apparent that the mere fact that American investors, such as plaintiff, might somehow be permitted to assert jurisdiction here cannot upgrade the standing of the foreign purchasers.

Without giving any consideration to the foregoing facts and authorities, Judge Carter seems to have concluded that the claims of the foreign purchasers were within his jurisdiction by reason of the fact that this action was instituted under Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a purported class consisting of all purchasers in the three offerings, including such foreign purchasers. Thus he stated that: "while [the number of American purchasers] might ultimately prove to be a small number of the class sought to be represented, the number is not determinative" (A269A) (emphasis added). As this remark indicates the District Judge seemingly reasoned that the class status of this action meant that once he had found jurisdiction under Section 10(b) over the claim of one member of the alleged

class, he had found jurisdiction over them all. However, this analysis is completely inconsistent with the controlling Supreme Court authority -- Zahn v. International Paper Co., 414 U.S. 291 (1973) -- and therefore must be reversed.*

In Zahn, the Supreme Court specifically held that every member of a purported Rule 23(b)(3) class must individually and in his own right have a claim which is within the subject matter jurisdiction of the court, and that the Rule does not authorize a court to construe a jurisdictional statute any differently than it would have done had separate suits been brought by each class member. Quoting from this Court's earlier decision in the same case, the Supreme Court stated: "'one plaintiff may not ride in on another's coattails.'" 414 U.S. at 301, quoting from 469 F.2d 1033, 1035 (2d Cir. 1972).

Thus Zahn refused to read Rule 23(b)(3) as authorizing any departure from its settled rule that class actions not involving any joint right among plaintiffs are, "'in effect, but a congeries of separate suits so that each claimant must, as to his own claim meet jurisdictional requirements.'" 414

* Moreover the sole case cited by Judge Carter in support of this analysis (A269A), S.E.C. v. United Financial Group, supra, is completely distinguishable, since that was an S.E.C. proceeding in which injunctive relief was sought, not individual claims for damages such as are made in this action.

U.S. at 296, quoting from Steel v. Guaranty Trust, 164 F.2d 387, 388 (2d Cir. 1947). On the facts before it, the Supreme Court therefore held that the Rule did not warrant any change in the construction of 28 U.S.C. § 1332. Clearly it would be equally erroneous to construe Rule 23(b)(3) as authorizing any departure from the well-settled rule that Section 10(b) of the Exchange Act does not confer federal jurisdiction over the claim of a foreign national who purchased a foreign security in a foreign country. See cases cited, p. 54, supra.

In light of Leasco's explicit rejection of the view that, in enacting Section 10(b), "Congress meant to impose rules governing conduct throughout the world in every instance where an American . . . bought or sold a security," 468 F.2d at 1337, Zahn makes it clear that Rule 23(b)(3) should not be applied so as to radically enlarge the jurisdictional reach of the Exchange Act. Here, as in Zahn, "to do so would undermine the purpose and intent of Congress." 414 U.S. at 301.

The principle followed in Zahn was specifically enforced in a purported class action under the securities laws in Goodman v. H. Hentz & Co., 265 F. Supp. 440 (N.D. Ill. 1967), where the court carefully determined whether each member of a purported class asserted a claim which was within

its jurisdiction, and concluded that "the court has no jurisdiction over some members of the class." As the court stated:

> Where jurisdiction is based upon a federal question, as in the case at bar, and a party who presents no substantial federal question joins the other plaintiffs, the court must dismiss the party presenting no substantial federal question.
>
> -- 265 F. Supp. at 442

Thus if the District Court relied on Rule 23(b)(3) to sustain jurisdiction over the claims of foreign citizens and residents who made purchases of a foreign security in foreign countries, its decision was erroneous and should be reversed.

The only other basis upon which Judge Carter may have relied in rejecting the argument that there is no jurisdiction over these foreign claims is the assumption that his "integration" holding adequately disposed of it (A268A). However if this was the District Court's reasoning it must respectfully be stated that the District Court confused two entirely distinct questions: (a) whether the conduct of the various defendants can be imputed to one another, so that they can be treated as joint tort-feasors, and (b) whether the conduct or nationality of the various plaintiffs can be imputed to one another, so that they can be treated as joint claimants.

There is no doubt that these are entirely distinct questions. Thus in order to decide whether two or more defendants can be held jointly liable, it is necessary to examine the relationship between such defendants. In order to decide whether two plaintiffs are asserting a joint claim, it is necessary to examine the relationship between such plaintiffs.

In the instant case, Judge Carter did not examine the relationships among the plaintiffs. Certainly, if he had, he would have found it crystal clear that there existed no relationship among the tens of thousands of world-wide purchasers in the 1969 offerings that would warrant treating their claims as joint for purposes of jurisdiction. On the contrary, it is clear that the claims asserted herein are several and independent: each plaintiff seeks damages for his loss in a particular transaction of purchase by him. Under the circumstances -- to use Judge Carter's own terms -- there is no basis for saying that the claims of the purchasers can be "integrated".

For the foregoing reason, "integration" is irrelevant to the question of whether foreigners who bought in the 1969 offerings can sue in this court under the United States securities laws. Judge Carter's contrary conclusion was in error, and his decision must be reversed.

Conclusion

For the reasons stated above the decision of the District Court should be reversed, and the complaint dismissed for lack of jurisdiction over the subject matter of this action.

Dated: New York, New York
February 3, 1975

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 3RD day of FEBRUARY 1975

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